

1 Renata B. Hesse (SBN 148425)
2 (hesser@sullcrom.com)
3 Sverker K. Hogberg (SBN 244640)
4 (hogbergs@sullcrom.com)
5 SULLIVAN & CROMWELL LLP
550 Hamilton Avenue
Palo Alto, California 94301
Telephone: (650) 461-5600
Facsimile: (650) 461-5700

6 Shane M. Palmer (SBN 308033)
(palmersh@sullcrom.com)
7 SULLIVAN & CROMWELL LLP
125 Broad Street
8 New York, New York 10004
Telephone: (212) 558-4000
9 Facsimile: (212) 558-3588

10 *Attorneys for Non-Party Spotify USA Inc.*

11 **UNITED STATES DISTRICT COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA**

13
14 **IN RE GOOGLE PLAY STORE**) Case No. 3:21-md-02981-JD
15 **ANTITRUST LITIGATION**)
16 THIS DOCUMENT RELATES TO:)
17 *Epic Games, Inc. v. Google LLC*, No. 3:20-cv-) **STATEMENT OF LEGAL
18 05671-JD**) **AUTHORITY PURSUANT TO CIVIL
19) LOCAL RULE 79-5(f)(3) AND IN
20) RESPONSE TO EPIC'S
21) ADMINISTRATIVE MOTION TO
22) CONSIDER WHETHER ANOTHER
23) PARTY'S MATERIAL SHOULD BE
24) SEALED (MDL DKT. NO. 775)
25)
26) Judge: Hon. James Donato
27)
28)**

1 Non-party Spotify USA Inc. (“Spotify”) submits this Statement of Legal Authority
2 stating the reasons why the redacted portions of Epic Games, Inc.’s (“Epic”) Opposition to
3 Google’s and Spotify’s Administrative Motions to Seal Trial Exhibits and Portions of Deposition
4 of Sandra Alzetta (MDL Dkt. No. 774) (“Opposition”) should remain under seal. The redacted
5 portions of the document describe certain terms of Spotify’s highly confidential, first-of-its-kind
6 agreement with Google regarding User Choice Billing (“UCB”), which the parties have designated
7 in this trial as Exhibit 1532. Spotify’s competitive standing would be harmed if the terms of the
8 UCB agreement were made public, and, as such, the agreement and its terms are properly sealed.

25 The “compelling reasons” standard is met here for several reasons:

26 First, the Ninth Circuit has recognized that “pricing terms” in confidential
27 agreements such as the one at issue here “plainly fall[] within the definition of ‘trade secrets’”
28 because they provide the parties “an opportunity to obtain an advantage over competitors.” *In re*

1 *Elec. Arts, Inc.*, 298 Fed. App'x 568, 569 (9th Cir. 2008) (quoting Restatement of Torts § 757,
 2 cmt. b). Although trade secrets often consist of pricing formulas or information relating to the
 3 production of goods, they may also “relate to the sale of goods or to other operations in the
 4 business.” *Philips v. Ford Motor Co.*, 2016 WL 7374214, at *2 (N.D. Cal. Dec. 20, 2016) (quoting
 5 *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). Following that guidance, courts in this
 6 District “regularly find that litigants may file under seal contracts with third parties that contain
 7 proprietary and confidential business information.” *Finisar Corp. v. Nistica, Inc.*, 2015 WL
 8 3988132, at *5 (N.D. Cal. June 30, 2015) (citing cases). Many of these cases deal with requests
 9 to seal license agreements; here, Spotify would be harmed by public disclosure of the pricing terms
 10 of the UCB agreement in much the same way that a licensee would be harmed by disclosure of its
 11 license agreement. The market for audio and music streaming apps is highly competitive, and
 12 Spotify competes against rival streaming apps by (among other things) negotiating with
 13 distribution partners to keep distribution costs as low as possible. (*See* Alzetta Decl. (Dkt. No.
 14 800) ¶ 8.) If the pricing terms of the UCB agreement were made public, Spotify’s competitors
 15 might demand similar pricing from their distribution partners, without first having to make
 16 significant investments in research and development or agree to the non-price commitments in the
 17 UCB agreement that Spotify has done in order to secure favorable terms for itself. (*Id.* ¶¶ 6, 9.)

18 In any event, Epic acknowledges that not all of these cases concern licensing
 19 agreements. (*See* Opposition at 3 n.4.) Courts have also sealed in full a party’s “confidential
 20 agreements setting forth [its] sales relationships and business dealings” with third parties, *Asetek*
 21 *Holdings, Inc. v. CMI USA, Inc.*, 2014 WL 12644231, at *2 (N.D. Cal. Sept. 23, 2014); customer
 22 agreements that include “product rates, rate structures,” “exclusivity requirements, and other
 23 confidential terms,” *Nicolosi Distrib., Inc. v. Finishmaster, Inc.*, 2018 WL 3932554, at *3 (N.D.
 24 Cal. Aug. 16, 2018); and portions of an expert report that “divulge[d] terms of confidential
 25 contracts [or] contract negotiations,” *Fed. Trade Comm'n v. Qualcomm Inc.*, 2019 WL 95922, at
 26 *3 (N.D. Cal. Jan. 3, 2019). This authority, too, supports sealing the UCB agreement and its terms.

27 Second, disclosure of the terms of the UCB agreement would unfairly disadvantage
 28 Spotify in negotiations with its other payment and distribution partners. Spotify strives to offer its

1 app on every type of device and on every platform where its users want to listen to music or stream
 2 audio. This means that Spotify is continuously negotiating and renegotiating with current and
 3 potential distribution partners. (Alzetta Decl. (Dkt. No. 800) ¶ 8.) If the terms of the UCB
 4 agreement were made public, those counterparties could use that information in negotiations to
 5 extract terms and conditions from Spotify that they may not have otherwise been able to, or could
 6 make demands in deal negotiations that Spotify cannot agree to, which will cause harm to Spotify
 7 and to consumers if the parties cannot conclude those deals. (*Id.* ¶ 9.) “[T]he need to avoid
 8 competitive disadvantage in contract negotiations . . . is a compelling reason that justifies sealing,”
 9 and as such the terms of the UCB agreement should remain under seal.¹ *Philips*, 2016 WL
 10 7374214, at *4.

11 *Third*, Spotify and Google have taken care to ensure that the terms of the UCB
 12 agreement remain confidential. Section 7 of the UCB agreement contains a confidentiality
 13 provision making the terms of the agreement subject to a Non-Disclosure Agreement between the
 14 parties, and it prohibits Spotify and Google from making public statements about the UCB
 15 agreement without the other’s written approval. (Alzetta Decl. (Dkt. No. 800) ¶ 7.) Spotify did
 16 not produce a copy of the UCB agreement in this litigation, and Spotify understands that when
 17 Google produced the agreement it was designated as “NON-PARTY HIGHLY CONFIDENTIAL”
 18 pursuant to the protective orders in this action. Courts in this District have pointed to the existence
 19 of similar confidentiality provisions in decisions granting requests to seal agreements that reveal
 20 the parties’ confidential business information. *See, e.g., Asetek Holdings*, 2014 WL 12644231, at
 21 *2 (sealing agreements that contained competitively sensitive information where disclosure of the
 22 information would constitute a breach of the confidentiality provisions of the agreements).

23 For all of these reasons, Spotify respectfully requests that the redacted portions of
 24 Epic’s Opposition remain under seal.

25
 26
 27 ¹ Contrary to Epic’s assertions (Opposition at 1, 3), even certain aspects of the UCB
 28 agreement itself remain subject to negotiation, including the implementation of the very payment-
 related terms that are described in Epic’s Opposition. (*See* Alzetta Decl. (Dkt. No. 800) ¶ 6.)

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2 /s/ Shane M. Palmer

3 Shane M. Palmer (SBN 308033)
4 SULLIVAN & CROMWELL LLP
5 125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588
Email: palmersh@sullcrom.com

6 Renata B. Hesse (SBN 148425)
7 Sverker K. Hogberg (SBN 244640)
8 SULLIVAN & CROMWELL LLP
550 Hamilton Avenue
Palo Alto, California 94301
Telephone: (650) 461-5600
Facsimile: (650) 461-5700
Email: hesser@sullcrom.com
hogbergs@sullcrom.com

11 *Attorneys for Non-Party Spotify USA Inc.*